(28,691)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 266.

W. T. CAMPBELL, PLAINTIFF IN ERROR,

vs.

THE CITY OF OLNEY.

IN ERROR TO THE COUNTY COURT OF YOUNG COUNTY, STATE OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 4, 1922.

1-2 *Caption.*

THE STATE OF TEXAS,
County of Young:

"At a term of the County Court, begun and holden at Graham, within and for the County of Young County, on the 3rd day of October, A. D. 1921, and which will adjourn on the 31st day of December, A. D. 1921, the Hon. W. H. Reeves, Judge thereof presiding, the following cause came on for trial, to-wit:

#935.

CITY OF OLNEY

VS.

W. T. CAMPBELL."

3 *Citation in Justice Court.*

THE STATE OF TEXAS:

To the Sheriff or any Constable of Young County, Greeting:

You are hereby commanded that you summon W. T. Campbell to appear before me, at a regular term of the Justice's Court for Precinct No. 3 in said County of Young, to be held at my office in the City of Olney in the County of Young on the 18th day of August A. D. 1921, to answer the suit of The City of Olney, Texas, Plaintiff, against W. T. Campbell defendant, being numbered No. 567 on the Docket of said Court, the plaintiff's demand being for the sum of eighty-nine and 32/100 dollars, due upon Certificate of Assessment issued by the City of Olney, Texas, by and through its municipal officers, and upon the charge and claim against W. T. Campbell personally referred to in and represented by said certificates—being amount due for sidewalk on Main Street in the City of Olney, in Young County, Texas, along and adjoining lots eleven (11) and twelve (12) of Block No. twelve (12) and lots numbers one (1) and two (2) in Block No. seventeen (17) of the Olney Townsite, in the City of Olney, in Young County, Texas, which sidewalk was laid and constructed under and by virtue of the provisions of Chapter Eleven (11) of title twenty-two of the Revised Statutes of the State of Texas, the provisions of which chapter had therefore been adopted by the City of Olney at an election held for that purpose; this suit being for the purpose of enforcing the personal charge against the said W. T. Campbell, as the owner of said lots at the time said sidewalks were laid, and not for the purpose of foreclosing any lien on the property;

Herein fail not, and of this writ make due return to the next regular term of the Justice's Court for Precinct No. 3 in said County of Young, to be held on the 18th day of August A. D. 1921, next.

Given under my hand, this 6th day of August, A. D. 1921.

J. J. GRAY,

4 *Justice of the Peace,*

Precinct No. 3, Young County, Texas.

Officer's Return.

Came to hand on the 5 day of August 1921, at 6 o'clock P. M., and executed within said County of Young on the 6 day of August 1921, at 8 o'clock A. M., by delivering the within named W. T. Campbell at Olney, in person a true copy of this citation.

W. W. RHODES,

Constable,

Precinct No. 3, Young County, Texas.

Fees:

Serving Copy..... .70

Endorsement: File No. 567. Justice's Court Precinct No. 3 of Young County, Texas. Citation. City of Olney vs. W. T. Campbell. Issued the 6th day of August, 1921. J. J. Gray, J. P., Precinct No. 3, Young County, Texas.

Precinct No. 3, Young County, Texas, —— ——, J. P.

Transcript in Justice Court.

No. 557.

CITY OF OLNEY, Plaintiff,

vs.

W. T. CAMPBELL, Defendant.

H. C. McClure, Plaintiff's Attorney.
Fitzgerald and Graham, Defendant's Attorney-.

Suit upon acct. for $89.32, Citation issued 6 day of Aug. 1921, returnable Aug. term 1921, and placed in the hands of W. W. Rhodes Constable Precinct No. 3, Young County, Texas.

Continued to Sep. term by mutual consent of parties.

Plaintiff also pleads that Def. W. T. Campbell was now estop-ed by Art. 1015 from setting up any defense of invilidity of the prosecuting and assessments.

Sept. 19th, 1921. Now on this day came on to be heard the above styled & numbered cause, and all parties were present, and announced ready for trial and a jury being waived all matters of facts as well as of law were submitted to the court, and the court after hearing the case is of the opinion that the law as well as the facts are

with the defendant, it is ordered therefore that the defendant go hence without day and that plaintiff take nothing by his suit.

J. J. GRAY,
J. P., Prin. No. 3, Young County, Texas.

Total all costs paid $9.80.

THE STATE OF TEXAS,
County of Young:

I, J. J. Gray Justice of the Peace, do hereby certify that the above and foregoing is a true and correct transcript of the entries on my Docket, on page 16 in the cause of City of Olney vs. W. T. Campbell and that the foregoing Bill of Costs is a true and correct statement of the costs incurred in said cause to this date. Witness my official signature, at Olney Tex. this 28 day of Sep. 1921.

J. J. GRAY,
Justice of the Peace,
Precinct No. 3, Young County, Texas.

Endorsement. No. 557. Transcript of Judgment from Justice's Court, Precinct No. 3. City of Olney vs. W. T. Campbell. Issued 6 day of Aug. A. D. 1921. J. J. Gray, J. P., Precinct No. 3, Young Co., Texas. Filed 1st day of Oct. A. D. 1921. W. H. Kennedy, Clerk, County Court, Young County, Texas.

In Justice Court, Precinct No. 3, Young Co., Texas.

THE CITY OF OLNEY, TEXAS,

VS.

W. T. CAMPBELL.

Plaintiff's Pleadings.

This is a suit by The City of Olney (a municipal corporation under the general law of the State of Texas) in Young County, Texas, of which M. P. McCracken, of Young County, Texas, is Mayor, and A. T. Gray, of Young County, Texas, is Secretary;

Plaintiff asks for judgment against W. T. Campbell, of Young County, Texas, defendant, for the sum of eighty-nine and 32/100 dollars ($89.32) on Certificate of Assessment herewith filed, and upon the claim and charge against W. T. Campbell referred to in and represented by said certificate, being amount due for sidewalk on Main Street in the City of Olney in Young County, Texas, along and adjoining lots eleven (11) and twelve (12) of Block No. twelve (12) and lots numbers one (1) and two (2) in Block No. seventeen (17) of the Olney Townsite, in the City of Olney, in Young County, Texas, which sidewalk was laid and constructed under and by virtue of the provisions of Chapter Eleven of Title twenty-two of the Revised Statutes of the State of Texas, the provisions of which Chapter

had theretofore been adopted by the City of Olney at an
6 election held for that purpose; this suit being for the purpose of enforcing the personal charge against the said W. T. Campbell, as owner of said sidewalks at the time said sidewalks were laid and said assessment made, and not for the purpose of foreclosing any lien on the property.

H. C. McCLURE,
Attorney for Plaintiff,
The City of Olney, Texas.

Filed Aug. 6, 1921.
J. J. GRAY.

Defendant's Pleadings.

Defendant's pleadings were oral: That the plaintiff could not recover because its act in making the assessment was void in this:

(*a*) At the time the assessment was made, the City of Olney had no ordinance authorizing said assessment.

(*b*) It had not passed and published an ordi-ance authorizing notice and hearing of said assessment.

(*c*) The assessment was made without a hearing.

(*d*) Said assessment was made without considering the benefits or advantages to defendant's property.

(*e*) The City of Olney not having complied with said statute known as Title 22, Chapter 11, and being Article 106 to 117 inclusive, of the Revised Civil Statutes of Texas, was without authority to invoke these provisions and its acts and conduct in making said assessments in the manner above set out, was contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States, in that it was a taking of the property of the citizen without due process of law.

The jury consisting of I. B. Padgett and five other good and lawful citizens, was duly and legally impaneled to try this case in the County Court of Young County, Texas, on the appeal of said cause from the Justice Court of Precinct No. 3, in Young County, Texas.

#935.

7 THE CITY OF OLNEY

VS.

W. T. CAMPBELL.

Judgment.

October 6", 1921.

On this day came on to be heard the above styled and numbered cause for trial and the parties both appearing in person and by

counsel and announced ready for trial, whereupon there came on a jury of six good and lawful men to-wit I. B. Padgett and five others who were chosen, sworn and empaneled to try said cause and who after hearing the evidence introduced and the argument of counsel thereon and the charge of the court retired to consider of their verdict and who afterwards came into open court in charge of the proper officer with their verdict which was received by the court and ordered read by the clerk and is here now entered on the minutes of this court in words as follows "We the jury find for the plaintiff in the sum of $89.32 I. B. Padgett, foreman."

It is therefore ordered, adjudged and decreed by the court that the plaintiff the City of Olney Texas a municipal corporation do have and recover of and from the defendant W. T. Campbell the sum of $89.32 with interest thereon from this date at rate of 8% per annum and all costs of suit for which let execution issue.

W. H. KENNEDY,
County Clerk.

Filed November 17, 1921.

Recorded Vol. 4, page 118, Min. County Court, Young Co., Texas.

In the County Court, Young County, Texas.

October Term, A. D. 1921.

No. 935.

THE CITY OF OLNEY

vs.

W. T. CAMPBELL.

Amended Motion for New Trial.

Comes now the defendant, W. T. Campbell, leave of the court being had and obtained for that purpose, and makes and files this his first amended motion for a new trial in said cause, and for amendment says:

Defendant moves the court to set aside its judgment heretofore rendered in said cause, and grant him a new trial, for the following good and sufficient reasons, to-wit:

(1) The court erred in not allowing the said defendant to prove on the trial of said cause that the plaintiff had not complied
8 with the law as set out in its assessment certificate introduced in evidence, for the reasons that the plaintiff could not invoke the provisions of the Revised Civil Statutes of Texas, known as Chapter 11, Title 22, and being Articles 106 to 117 inclusive, for the reasons that the City of Olney had no ordinance or resolution of any kind or character, ordering or directing the character of improve-

ments to be made, as called for in said certificate, at the time the assessment against this defendant was made, upon which said certificate is based.

(2) Because there was no ordinance or resolution as provided by law for a hearing and notice of said assessment, and said action of the plaintiff in said matters was null and void, and of no force and effect.

(3) The court erred in not permitting the defendant to prove that he was denied a hearing at the time said assessment was made, and that the question of benefits to defendant's property was not considered by the Council, at the time said assessment was made, and that said improvement was a detriment and not a benefit to defendant's property, and for said reason was void, and of no force and effect, and that the same constituted a taking of defendant's property without due process of law, and was contrary to Section 1 of the 14th Amendment of the Constitution of the United States.

(4) The court erred in refusing to allow the defendant to introduce any testimony on the trial of said cause, and especially in denying to the defendant the right to prove that the City of Olney had no ordinance or resolution at the time the purported assessment was made, authorizing the imprvements to be constructed, and no ordinance or resolution fixing a time for hearing, and the character of notice to be given, as provided by the Statute, and also in denying the defendant the right to prove that the defendant had been denied a hearing, and that the assessment was of no benefit to defendant's property, and that the city did not take into consideration the question of benefits to defendant's property, because said matters
9 would have fully established the fact that the defendant was having his property and his property rights taken from him, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(5) The court erred in holding that the defendant had no right to defend the action brought by the plaintiff in this case, and to prove by the witnesses that the plaintiff had not complied with the law, in that, it had not passed the proper ordinances called for — the Statute, making and authorizing said public improvements, and also the proper ordinance and resolution providing for hearing and notice of hearing, time and place of hearing, provided by the Statute, and also that the defendant was denied a hearing as provided for by statute, on the theory, and because Article 1015 of the Revised Civil Statutes of Texas made it a condition precedent to defendant's right to attack said assessment for invalidity that he brings a suit within twenty days after the date of said hearing, because the failure of the plaintiff to adopt, declare and publish the ordinances called for in the Statute, made its acts and conduct in making this assessment absolutely void, and also the plaintiff was without right to invoke the provisions of said statute until it had brought itself within the provisions of said statute, by complying with the Articles therein,

and its failure to do so made the assessment in the first instance a nullity, and for said reasons, the defendant was not barred from interposing the defense herein offered, for the reasons that it would be a taking of defendant's property without due process of law, and contrary to Section 1 of the 14th Amendment to the Constitution of the United States, and also contrary to Section- 17 and 19 of Article 1 of the Constitution of the State of Texas.

(6) The court erred in allowing the plaintiff to recover against the defendant in this case, on the introduction of the certificate of assessment alone, for the reasons that said certificate was wholly insufficient to establish a prima facie case against this defend-
10 ant, which said certificate is referred to and made a part of the amended motion for a new trial for the reasons that the plaintiff was not authorized to issue any such certificate, it having not complied with the law relative thereto, in that the said certificate was based upon an assessment made without any ordinance or resolution theretofore published, or any ordinance or resolution providing for notice, time and place of hearing, and in that said assessment was had without consideration of the benefits to defendant's property.

(7) Defendant says that the court committed error in holding that the defendant was estopped from interposing the character of defenses plead on the trial of said cause in its answer, because said defendant did not bring a suit within 20 days after the date of the assessment sued on, and was thereby estopped, under Article 1015 of the Revised Statutes of the State of Texas, for the reason that said statute is not applicable to the character of defenses plead, and further, that said statute, in so far as it undertakes to estop the defendant from interposing these defenses, is repugnant to Section 1 of the 14th Amendment to the Constitution of the United States.

Wherefore premises considered, defendant prays the court to set aside its judgment in said cause, and grant him a new trial, and in duty bound will ever so pray,

BROWN & GRAHAM AND
FITZGERALD & HATCHITT,
Attorneys for Defendant.

"EXHIBIT A," ATTACHED TO MOTION FOR NEW TRIAL.

Certificate.

Know all men by these presents: That, whereas, under and by virtue of the provisions of Chapter Eleven of Title Twenty-two of Vernon's "Complete Texas Statutes, 1920," (the provisions of which chapter had theretofore been adopted by the City of Olney at an election held for that purpose in accordance with Article 1016 of same) the City of Olney has had sidewalks laid and constructed on

and along a portion of Main Street in said city, after due notice
11 to the owners of the property abutting thereon and assessment of the cost thereof as a charge against the respective property owners; and

Whereas, a portion of said sidewalk was laid and constructed along lots eleven (11) and twelve (12) of Block Number twelve (12) and Lots (1) one and (2) two in Block 17, of the Olney Townsite, in said City of Olney, in Young County, Texas, and the cost of such sidewalk duly assessed and made a charge and lien upon said lots and a personal charge against W. T. Campbell, as owner, in accordance with the provisions of said statute; and,

Whereas, the proceedings with reference to the laying and constructing of said sidewalk have been regularly had in compliance with law, and all prerequisites to the fixing of the assessment lien against the said property, and the personal liability therefor, have been performed and complied with.

Now, therefore, the City of Olney does now declare the cost of said sidewalk along and adjacent to said lots eleven (11) and twelve (12) in Block number twelve (12) and lots 1 and 2 in Block 17, of the Olney Townsite, in Olney, in Young County, Texas, that is to say, the sum of eighty-nine and 32/100 dollars, ($39.32) a personal charge against the said W. T. Campbell, his heirs and legal representatives, and a charge and lien on and against the said four lots, in accordance with the provisions of said statute, and now issues this certificate to declare and evidence said charge and lien;

This certificate is payable on demand to the order of The City of Olney, at Olney, Texas, and bears interest after demand for payment until paid at the rate of eight per cent per annum;

In the event default is made in the payment of this certificate upon demand, and same is placed in the hands of an attorney for collection, or suit is brought on same, or same is collected through
12 the probate court, then an additional amount to one-third of the amount of principal and interest due shall be added and collected as attorney fees;

This certificate is assignable; and an endorsement hereon, transferring the said claim against the said W. T. Campbell, together with all the rights, powers, and privileges incident thereto and now held by said city, including the said charge and lien against the said property;

In witness whereof, the City of Olney, Texas, has caused these presents to be signed by M. P. McCracken, its Mayor, Geo. W. Cook, its Street Commissioner, and attested by A. T. Gray, its Secretary, with its corporate seal affixed, on this the 18th day of July A. D. 1921.

THE CITY OF OLNEY, TEXAS,
By M. P. McCRACKEN, *Mayor.*
G. W. COX, *Street Commissioner.*

Attest:
A. T. GRAY.

Filed November 17, 1921. W. H. Kennedy, County Clerk.

In the County Court of Young County, Texas, October Term, A. D. 1921.

No. 935.

CITY OF OLNEY

vs.

W. T. CAMPBELL.

Order Overruling Motion for New Trial.

Now on this the 16th day of November A. D. 1921, came on to be heard the defendant's motion for a new trial herein, and the court after hearing the same is of the opinion that it should be over-ruled in all things, which is accordingly so done, to which action of the court, the defendant then and there in open court excepted, and the County Court of Young County, Texas, being the highest state court to which this cause can be taken on appeal (the suit having originally been filed in the Justice Court in and for Precinct No. 3 of Young County, Texas, for the sum of $89.32, and having been appealed to the County Court of Young County, Texas, the highest Appellate Court to which said cause can be taken in the State of Texas, because the amount in controversy is less than $100) the defendant then and there in open court gave notice of appeal to the Supreme Court of the United States.

W. H. REEVES,
Judge.

Filed Nov. 17, 1921. W. H. Kennedy, County Clerk.

13 Recorded Vol. 4, page 118, Min. County Court Young Co., Texas.

In the County Court of Young County, Texas, October Term, A. D. 1921.

No. 935.

CITY OF OLNEY

vs.

W. T. CAMPBELL.

Amended Assignment — Errors.

Now comes the defendant, W. T. Campbell, and files this his assignments of error in the above styled and numbered cause, and asks that the same be filed, approved and made a part of the record herein, to-wit:

(1) The Court erred in not allowing the defendent to prove on the trial of said cause that the plaintiff had not complied with the law, as set out in its assignment Certificate, introduced in evidence, in that, it had no ordinance or resolution of any kind or character, ordering or directing the putting in of sidewalks, or that character of improvements represented by its certificate, at the time the assessment against this defendant was made, for the reason that the City of Olney was without authority to invoke the provision of chapter 11, Title 22, and being Article 106 to 117 inclusive, without the adoption of said ordinance or resolution.

(2) The Court erred in refusing to allow the defendant to prove on the trial of said cause that the plaintiff had never passed any ordinance or resolution, providing for a hearing, and notice of the character of assessment, called for in its certificate, without this notice, the action of the City Council was a nullity, and amounted to the taking of Plaintiff's property, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(3) The Court erred in not permitting the defendant, on the trial of said cause, to prove that he was denied a hearing at the time the assessment was made against him, for the reason that without such hearing, the action of the City was null and void, and it amounted to the taking of defendant's property, without due process of law, and was contrary to Section 1 of the 14th Amendment to the Constitution of the United States.

(4) The trial court erred in not allowing the defendant, W. T. Campbell, to prove that the City Council, in making said assessment against him, did not take into consideration the ben-
14 efits to the defendant's property, and that said assessment was made without taking into account the benefit said improvements would be to defendant's property, for the reason that said evidence would have shown that the City Council did not take into account said benefits, and their action in making said assessment was null and void, and contrary to the law, and inhibited by Section 1 of the 14th Amendment to the constitution of the United States.

(5) The court erred in not allowing the defendant to prove on the trial of said cause that the City Council of Olney had never passed any ordinance or resolution, providing for the fixing of a time, and the notice of a hearing, on the question of assessment, as provided by Statute; because, without such an ordinance or resolution the action of the city, in making the assessment, was void, and of no force and effect, and constituted a taking of defendant's property, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(6) The Court erred in holding that the defendant could not introduce any testimony on the trial of said cause, because Article 1115 of Chapter 11, Title 22 provided that the defendant must

bring a suit to set aside the assessment within twenty (20) days after such assessment was made by the City, or thereafter be estopped from interposing any character of defense to plaintiff's suit to recover on said assessment; for the reason that, if the defendant could show, and which he could have shown, that the city council had never adopted or passed any ordinance or resolution, placing the Municipal Government of Olney under the provisions of said Chapter and Title, that it would be without authority to invoke the provisions of said Chapter against this defendant, and for said reasons would constitute a taking of the defendant's property, and denying the defendant his day in court, all of which is contrary to Section 1 of the 14th Amendment of the Constitution of the United States.

15 (7) The court erred in not allowing the defendant to introduce testimony on the trial of said cause, showing that the plaintiff had not complied with the Articles of said Statute, in this:

(*a*) That it had passed no ordinance or resolution, adopting the provisions of said Statute, and the time said assessment was made.

(*b*) That it had passed no ordinance or resolution, providing for the assessment that was made against the defendant.

(*c*) That it had passed no ordinance or resolution, providing for notice and a hearing on said assessment, at the time the assessment was made; because the certificate introduced in evidence, at best, only made a prima-facie case, which the defendant had a right to overcome, with the character of proof set out above.

Wherefore, the appellant prays that said decree be reversed and rendered, and that said County Court for the County of Young, in the State of Texas, be ordered to enter a decree in accordance with said decision, and that the lower Court be so directed to make the proper decree.

BROWN & GRAHAM, AND
FITZGERALD & HATCHITT,
Attorneys for Appellant.

Filed Nov. 25, 1921.

W. H. KENNEDY,
County Clerk.

In the County Court, Young County, Texas.

No. 935.

THE CITY OF OLNEY

VS.

W. T. CAMPBELL.

Bill of Exception No. 1.

Be it remembered that upon the trial of the above styled and numbered cause, and after a jury had been duly impanelled to try said cause, and after Counsel had presented to the Court and jury their pleadings in said cause, that the Plaintiff introduced the following certificate of assessment against the defendant in this cause, which certificate reads as follows:

16 THE STATE OF TEXAS,
County of Young:

Know all men by these presents:

That whereas, under and by virtue of the provisions of Chapter Eleven of Title twenty-two of Vernon's "Complete Texas Statutes, 1920" (the provisions of which chapter had theretofore been adopted by the city at an election held for that purpose in accordance with article 1016 of same) the City of Olney has had sidewalks laid and constructed on and along a portion of Main Street in said city, after due notice to the owners of the property abutting thereon and assessment of the cost thereof as a charge against the respective property owners and

Whereas, a portion of said sidewalk was laid and constructed along lots eleven (11) and twelve (12) of Block number twelve (12) and lots (1) one and (2) two in Block 17, of the Olney Townsite, in said City of Olney, in Young County, Texas, and the cost of such sidewalk duly assessed and made a charge and lien upon said lots and a personal charge against W. T. Campbell, as owner, in accordance with the provisions of said statute; and,

Whereas, the proceedings with reference to the laying and constructing of said sidewalk have been regularly had in compliance with law, and all prerequisites to the fixing of the assessment lien against the said property, and the personal liability therefor, have been performed and complied with;

Now, therefore, the City of Olney does now declare the cost of said sidewalk along and adjacent to said lots eleven (11) and twelve (12) in Block number twelve (12) and Lots 1 and 2 in Block 17, of the Olney Townsite, in Olney, in Young County, Texas, that is to say, the sum of Eighty-nine and 32/100 Dollars, ($89.32) a personal charge against the said W. T. Campbell, his heirs and

legal representatives, and a charge and lien on and against the said four lots, in accordance with the provisions of said statute, and now issues this Certificate to declare and evidence said charge and lien;

17 This certificate is payable On Demand to the order of The City of Olney, at Olney, Texas, and bears interest after demand for payment until paid at the rate of eight per cent per annum;

In the event default is made in the payment of this certificate upon demand, and same is placed in the hands of an attorney for collection, or suit is brought on same, or same is collected through the probate court, then an additional amount equal to one-third of the amount of principal and interest due shall be added and collected as attorney fees;

This certificate is assignable; and an endorsement hereon, transferring and assigning same, shall vest in the assignee the said claim against the said W. T. Campbell, together with all the rights, powers, and privileges incident thereto and now held by said city, including the said charge and lien against the said property;

In witness whereof, the City of Olney, Texas, has caused these presents to be signed by M. P. McCracken, its Mayor, Geo. W. Cook, its Street Commissioner, and attested by A. T. Gray, its Secretary, with its corporate seal affixed, on this the 18th day of July, A. D. 1921.

THE CITY OF OLNEY, TEXAS,
By M. P. McCRACKEN,
Mayor;
G. W. COX,
Street Commissioner.

Attest:
A. T. GRAY,
City Secy.

To which testimony, the defendant objected, for the following reasons, to-wit:

That said certificate was a self serving, ex-parte declaration; that it did not show upon its face that the law and the provisions of the statute relative to making such assessments had been complied with; that the mere recital in said certificate that the provisions of the law had been complied with, was a conclusion and that said certificate was not sufficient within itself to establish a prima-facie case against the defendant, to all of which objections, the court overruled and allowed Counsel for Plaintiff to introduce said certificate;

18 to which action of the court, the defendant then and there excepted in open court, and here now tenders his bill of exceptions, and asks that the same be approved and filed as a part of the record in said cause, which is accordingly so done.

W. H. REEVES,
County Judge, Young County, Texas.

O. K.
F. T. A.
O. K.
W. E. FITZGERALD.
BROWN & GRAHAM.

Filed Nov. 17, 1921.
W. H. KENNEDY,
County Clerk.

In the County Court, Young County, Texas.

No. —.

THE CITY OF OLNEY

vs.

W. T. CAMPBELL.

Bill of Exception No. 2.

Be it remembered that upon the trial of the above styled and numbered cause, and after a jury had been duly impannelled and sworn to try said cause, and after the *the* plaintiff and defendant had read their pleadings to the court and jury, and after the plaintiff had introduced the certificate of assessment herein sued on, and rested its case, the defendant placed on the witness stand the Secretary of the City Council of the City of Olney, and offered to prove by said witness the following facts, and the witness would have testified to the following facts:

(1) That he as Secretary of the City Council, was the custodian of the City's books of ordinances and minutes; that the people of Olney had, by referendum vote, on the 21st day of February A. D. 1919, adopted the provisions of Chapter 11, Articles 1006 to 1017 inclusive of the Revised Statutes of the State of Texas, relating to the improvements of streets, avenues, alleys, highways and public places.

(2) That on February 24th, 1919, the Council canvassed said returns and declared that the vote was in favor of adopting the provisions of said statute.

(3) That the City Council on May 11, 1919, by notation upon its minutes, ordered concrete sidewalks to be laid along Lots 11 and 12, Block 12; Lots 1 and 2 in Block 17, abutting Main Street;
The East side of lot 12, Block 12, and Lot 17, Block 12,
19 abutting Grand Avenue; that no ordinance of any kind had theretofore been passed, enacted or de-lared by said City, relative to the laying of the sidewalk hereinabove mentioned; that there had only been one ordinance passed, and that was passed on

May 16, A. D. 1919, and was known as ordinance No. 59, and was in words as follows:

"Be it ordained by the City Council of Olney, Texas: That the provisions of Chapter Eleven, of Sales Rev. Civil Statutes of Texas, 1914 Art. 1006 to 1017 inclusive be and the same is hereby adopted by the City of Olney, and that all sidewalks constructed by the City of Olney under the provisions of said law, be and the same is hereby assessed against abutting property to said sidewalk, as a valid lien against the same. It is further ordained that twenty days' notice be given the owner of any property located in the City of Olney, before any cost of sidewalk be assessed alien against his property, or is held as a personal charge against him, said notice to be given by publication once each week for three consecutive weeks in some newspaper published in the City of Olney, Texas.

It is further ordered that assignable certificates may be issued for sidewalk improvements within the City of Olney, as provided for in Art. 1011, Sales Rev. Civil Statutes of Texas, A. D. 1914.

This ordinance shall be of full force and effect from and after its passage.

Passed in open Council this the 16th day of May, A. D. 1919.

ELMER GRAHAM,
Mayor.

Attest:
J. T. HUNT,
City Sec."

That no ordinance was ever passed ordering the laying of sidewalk along the property of this defendant; that no ordinance was ever passed at any time, making any assessment against defendant's property, and providing for the collection thereof, or authorizing the issuance of assessment certificate such as was sued on in said cause; that no ordinance was ever passed in said city, adopting any rules, regulations, providing for hearings to the property owners, and for the giving of reasonable notice of said hearing.

(4) Defendant proposed to prove further by said witness that at the time the assessment was made against the defendant's property, no discussion of benefits to defendant's property was had by said Council, and that the question of benefits to the defendant's property was not discussed or taken into consideration.

(5) Defendant expected to prove further by said witness that the City Council made said assessment against defendant's property, and set a time and place for hearing the defendant, and gave the defendant notice that the City Council met at said place on the date for said hearing, and was in session a short while, and adjourned and was not in session any more during said day.

Plaintiff objected to said testimony on the ground that Article 1015 of the Revised Statute- of the State of Texas, providing in effect that if the defendant was not satisfied with the assessment

and with the result of the hearing had thereon that he could bring a suit within 20 days to set aside said assessment, and that thereafter he could not be heard to complain, and in as much as the defendant had not brought such a suit that he was estopped from interposing any character of defense to plaintiff's cause of action. The court sustained said objection.

The defendant then and there, in open court, excepted to the Court's action, and then and there tendered this his bill of exception, and asks that the same be filed and approved, as part of the record in said cause, which was accordingly so done.

W. H. REEVES,
County Judge, Young County, Texas.

I approve the foregoing bill with this qualification: Defendant admitted in open court that the City of Olney had served proper notice of meeting of City Council on the defendant and that said notice had been received by defendant and that such meeting was for the purpose of hearing any complaint from defendant on
21 the building of sidewalks.

W. H. REEVES,
County Judge.

Filed Nov. 17, 1921.
W. H. KENNEDY,
County Clerk.

In the County Court, Young County, Texas.

No. —.

THE CITY OF OLNEY

vs.

W. T. CAMPBELL.

Bill of Exception No. 3.

Be it remembered that upon the trial of the above styled and numbered cause, the defendant offered to prove by W. T. Campbell that he was the defendant in said cause; that he resided in the town of Olney, Young County, Texas; that he received a notice from the City Council to appear before the City Council on June 6, 1921 to show cause why sidewalks should not be laid along his property; that on said date, he went to the usual and customary place of meeting of the City Council of Olney, Texas, and that the Council had adjourned, and was not in session at said time; that he saw the Councilmen about their places of business during the remainder of the day; that he was not given an opportunity of making any objection to the laying of said sidewalk on his property; that the sidewalk as laid was of no benefit whatever to his property; that it was only 3½ feet wide, and was laid much lower than his

property line; that the rest of the sidewalk along that street was some six or eight feet wide, and much higher than this sidewalk; that the sidewalk laid did not even reach to the edge of his building line on his property, and some six or eight inches lower than the base building line; that he would have to remove said walk in the event he built a business house on his said lots; that no business house or improvements of any kind were erected on these business lots, and that said improvements are wholly worthless as an improvement to his property. Said witness would have testified to all of said facts.

Council for plaintiff objected to all of said testimony on the ground that defendant was estopped from interposing any defense, under and by virtue of Article 1015 of the Revised Statutes 22 of the State of Texas.

The Court sustained said objection, to which action of the Court Counsel for the defendant then and there, in open court excepted, then and there tenders this his bill of exception, and ask that the same be filed and approved as a part of the record in said cause, which was accordingly so done.

W. H. REEVES,
County Judge, Young County, Texas.

Filed Nov. 17, 1921.

W. H. KENNEDY,
County Clerk.

In the County Court of Young County, Texas, October Term, 1921.

No. 935.

CITY OF OLNEY

vs.

W. T. CAMPBELL.

Supersedeas Bond.

Now on this the 25th day of November A. D. 1921, it having been made to appear to the Court that the defendant in the above styled and numbered cause is perfecting an appeal from the Judgment of this Court to the Supreme Court of the United States, and is desirous of having a supersedeas order entered in this case pending the final disposition of the appeal.

It is ordered, adjudged and decreed by the court that upon defendant giving a supersedeas appeal bond in double the amount of the judgment and costs, conditioned as required by law that the execution of said judgment in this court be stayed after the approval of

said supersedeas bond, pending the final disposition of said appeal to the Supreme Court of the United States.

W. H. REEVES,
Judge County Court, Young County, Texas.

Filed Nov. 25, 1921.

W. H. KENNEDY,
County Clerk.

23 In the County Court of Young County, in the State of Texas, October Term, A. D. 1921.

No. 935.

W. T. CAMPBELL, Appellant,

vs.

CITY OF OLNEY, Appellee.

Petition for Writ of Error.

To the Honorable W. H. Reeves, County Judge of the County Court of Young County, Texas:

Comes now W. T. Campbell, defendant in the above entitled cause, and shows by this petition to this Honorable Court that in the records, proceedings and decisions in the County Court of the County of Young, in the State of Texas, the same being the highest court of said State in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of said W. T. Campbell.

That, as appears in the record and proceedings there was drawn in question the issue, that said defendant, W. T. Campbell was being deprived of his property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in this; that the plaintiff was seeking to assess the defendant, and collect from him the sum of $89.00 for putting sidewalks along and adjacent to his property, without any ordinance authorizing such improvements, and without a hearing, and without taking into account the question of benefits resulting to defendant's property, by reason thereof, all of which fully appears in the records and proceedings of the case, and is specifically set forth in the assignment of errors filed herewith.

Wherefore, petitioner prays that a writ of error be allowed and that a transcript of the record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C.,

under the rules of such court in such cases made and provided, and that the same may be by the Honorable Court inspected and corrected in accordance with law and justice.

A. H. CARRIGAN,
Of Wichita Falls, Texas,
Attorney for Solicitor.

24 FITZGERALD & HATCHITT,
of Wichita Falls, Texas, and
BROWN & GRAHAM,
of Graham, Texas,
Of Counsel.

Filed Dec. 2, 1921.
W. H. KENNEDY,
County Clerk.

In the County Court of Young County, Texas.

No. 935.

THE CITY OF OLNEY

vs.

W. T. CAMPBELL.

Order Allowing Writ of Error.

On this the 10th day of December, A. D. 1921, the application of W. T. Campbell, plaintiff in this action for a writ of error, came on to be heard, said plaintiff being represented by Counsel, and it appearing to the court from the petition filed herein, and from the record filed therewith that his application should be granted, and that a transcript of the record, proceedings and papers, upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed, in order that such proceedings may be had as may be just.

Now, therefore, it is ordered that the Writ of Error be allowed upon bond furnished by the plaintiff, conditioned according to law, in the sum of $500.00, and that the same act as a supersedeas bond in said cause, and that a true copy of the record, assignment of errors and all proceedings in the case in the County Court of the County of Young in the State of Texas shall be transmitted to the Supreme Court of the United States, certified according to law, in order that said Court may inspect the same, and to take such action thereof as it deems proper according to law.

Witness my hand this the 10th day of December A. D. 1921.

W. H. REEVES,
County Judge of Young County, Texas.

Filed Dec. 2, 1921.
W. H. KENNEDY,
County Clerk.

25 In the County Court of Young County, Texas.

No. 935.

THE CITY OF OLNEY

vs.

W. T. CAMPBELL.

Writ of Error.

The President of the United States to the Honorable Judge of the County Court of Young, in the State of Texas, Greeting:

Whereas, in the record and proceedings and in the rendition of the judgment of the above entitled cause which is now before me between the City of Olney, plaintiff, and W. T. Campbell, defendant, said court being the highest court in this State having jurisdiction of said cause, there has been drawn in question the issue that said defendant, W. T. Campbell, was being deprived of his property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in this; that the plaintiff was seeking to assess the defendant, and collect from him the sum of $89.00 for putting sidewalks along and adjacent to his property, without any ordinance authorizing such improvements, and without a hearing, and without taking into account the question of benefits resulting to defendant's property, by reason thereof, all of which fully appears in the records and proceedings of the case, and is specifically set forth in the assignment of errors filed herewith, and;

Whereas, there is manifest error in said decision to the damage of W. T. Campbell, the petitioner in error, and whereas, this Court is willing that if there is error, it should be duly corrected.

I, Therefore, command that said judgment be sent under seal of this court, together with the record and proceedings in said cause to the Supreme Court of the United States, together with this writ, within such time as may be necessary, in order that the same may be at Washington on the — day of Oct. 1922, and that the record may be then inspected by the Supreme Court of the United States, to be then and there held in order that justice may be done.

Witness the Honorable W. H. Reeves, Judge of the County Court, in and for Young County, in the State of Texas.

W. H. REEVES,
County Judge of Young County, Texas.

Filed Dec. 2, 1921.
W. H. KENNEDY,
County Clerk.

26 *Citation.*

In the Name of the President of the United States of America.

In the County Court of Young County, Texas.

No. 935.

THE CITY OF OLNEY

vs.

W. T. CAMPBELL.

UNITED STATES OF AMERICA:

To the City of Olney and H. C. McClure and Fred Arnold, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the — day of Oct. A. D. 1922, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the County Court of Young County, Texas from a final decree signed, filed and entered on the 6th day of October A. D. 1921, in a certain suit No. 935, wherein the City of Olney is plaintiff and W. T. Campbell, defendant, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable County Court, in and for Young County, in the State of Texas, this the 10th day of December A. D. 1921, and of the Independence of the United States.

W. H. REEVES,
County Judge, Young County, Texas.

Waiver of Citation.

In the County Court of Young County, Texas.

No. 935.

THE CITY OF OLNEY

vs.

W. T. CAMPBELL.

On Writ of Error to the Supreme Court of the United States of America.

Know all men by these presents:

That we, H. C. McClure and Fred T. Arnold, as attorneys for the City of Olney in the above styled and numbered cause do hereby waive the issuance, service and return of citation on the writ of error sued out by appellant to the Supreme Court of the United States sitting at the City of Washington, in the District of Columbia. And whereas if there is error in the judgment of the trial Court we are willing that same be corrected and we hereby enter
27 our appearance at the October term of the United States Supreme Court at Washington, D. C., A. D. 1922, or at such time as the United States Supreme Court wishes to consider the writ of error.

In testimony whereof, witness our hands this the 15th day of December, A. D. 1922.

CITY OF OLNEY,
By H. C. McCLURE &
FRED T. ARNOLD,
Its Attorney- of Record.
—— ——,
Attorneys for Appellee.

Filed Dec. 2, 1921.

W. H. KENNEDY,
County Clerk.

In the County Court of Young County, Texas.

No. 935.

CITY OF OLNEY

vs.

W. T. CAMPBELL.

Appeal Bond.

Know all men by these presents:

That we, W. T. Campbell, as Principal, and the undersigned as sureties, of the County of Young, State of Texas, are held and firmly bound unto the City of Olney in the sum of $500.00 lawful money of the United States, to be paid to it and its successors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 28 day of Nov. 1921.

Whereas, the above named W. T. Campbell has prosecuted an appeal to the Supreme Court of the United States, to reverse the judgment of the County Court for Young County, Texas, in the above entitled cause.

Now Therefore, the condition of this obligation is such that if the above named W. T. Campbell shall prosecute his said appeal to effect and answer all costs, if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

W. T. CAMPBELL,
Principal.
A. E. CATHY,
A. J. LOWE,
Sureties.

28 STATE OF TEXAS,
County of Young:

On the 28 day of November, A. D. 1921, personally appeared before me W. T. Campbell and A. E. Cathey and A. J. Lowe, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein set forth, and the said W. T. Campbell, and A. E. Cathey and A. J. Lowe being respectively by me duly sworn, says each for himself, and not one for the other, that he is a resident and householder of the said County of Young, and that he is worth the sum of $500.00, over

and above his just debts, and liabilities and property exempt from execution.

W. T. CAMPBELL.
A. E. CATHY.
A. J. LOWE.

Subscribed and sworn to before me this the 28 day of November, A. D. 1921.

[SEAL.] A. D. McMILLAN,
Notary Public, Young County, Texas.

The within Bond is approved both as to sufficiency and form this the 2ond day of December, A. D. 1921.

W. H. REEVES,
County Judge, Young County, Texas.

Filed Dec. 2, 1921.

W. H. KENNEDY,
Co. Clerk,
By PEARL MATTHEWS,
Dpty.

Recorded Vol. 4, page 118, Min. County Court Young Co., Texas.

29 1935, Bill of Costs—Blank Fees.

Revised Civil Statutes.

Article 2098 amended so that oath in forma pauperis may be contested by officers of the Court, and the issue tried as to ability of the party to give bond for costs.

Article 2032 reads: It shall be lawful for Clerks of the District and County Courts, and Justices of the Peace, to demand payment of all costs due in each and every case pending in their respective courts, up to adjournment of each term of said courts.

Article 2033 provides: Ten days after such demand, the Clerk or Justice may place certified copy of Bill of Costs then due in hands of Sheriff or Constable for collection, which shall have force and effect of an execution. Taking an appeal does not interfere or suspend the right.

Article 2034 authorizes levy and sale, but no costs or charges allowed for making out Certified Bill of Costs or for collection, unless levy is made.

No. 935.

CITY OF OLNEY, Plaintiff,

vs.

W. T. CAMPBELL, Defendant.

M. —— ——, to Officers of Court, Dr., to Costs Accrued in Above Entitled Cause to Adjournment of — Term, 19—.

Date. Month.	Day.	Clerk's fees.	Dolls. cts.	Dolls. cts.
10	1/21.	Fil. & Dock	.25	
		" Trans. from J. P. Court Pre. 3	.10	
		Issu. Sub.	.25	
		" Sub. (5) Wit.	.85	
		" Subpœna	.25	
		" "	.25	
		Fil. "	.10	
		Judgment	1.00	
		Fil. 7 papers	.70	
		" 2 "	.20	
		Empaneling Jury	.50	
		Swearing 10 Wit.	1.00	
		Tax Cost	.25	
		Transcript to Higher Court	12.30	
			18.00	
		Jury fee	3.00	
		Judge's fee	3.00	

Sheriff's Fees.

Sum. Witness (1)	.50	
Mil.	.15	
Sum. (6) Witn.	5.10	
	5.75	

Recapitulation.

Miscellaneous Costs	6.00
Clerk's Costs	18.00
Sheriff's Costs	5.75
Total	$29.75

In County Court, Young County.

THE STATE OF TEXAS,
County of Young:

I, W. H. Kennedy, Clerk of the County Court in and for said County and State, hereby certify the above to be a correct account of the Costs in above entitled and numbered suit up to this date.

Given under my hand and official seal, the 22" day of December, A. D. 1921.

[Seal of County Court of Young County, Texas.]

W. H. KENNEDY,
Clerk County Court, Young Co.,
By —— ——,
Deputy Clerk.

[Endorsed:] Bill of Costs.

30 W. T. CAMPBELL, Plaintiff in Error,

vs.

CITY OF OLNEY, Defendant in Error.

I, W. H. Kennedy, Clerk of the County Court in and for Young County, Texas, do hereby certify that the foregoing Transcript consisting of 30 pages, constitutes a full, true and correct copy of the proceedings had and orders entered in the above entitled cause as set forth therein, as the same appears on file and of record in this office, with the writ of error, citation and assignment of error herewith attached, pages 25, 26, and 13, respectively, which are the Original writ, assignment and Citation, and the foregoing constitutes the entire transcript in the cause.

Witness my hand and official seal of said Court, this the 22nd day of December A. D. 1921.

[Seal of County Court of Young County, Texas.]

W. H. KENNEDY,
Clerk County Court, Young County, Texas.

31 In the Supreme Court of the United States.

No. 935.

W. T. CAMPBELL, Plaintiff in Error,

vs.

THE CITY OF OLNEY, Defendant in Error.

Petition for Writ of Error.

To the Honorable Wm. H. Taft, Chief Justice of the Supreme Court in and for the United States, and to the Associate Judges Thereof:

Comes now W. T. Campbell, Plaintiff in Error, in the above styled and numbered Cause, and shows by this petition to this Hon. Court that in the records, proceedings and decisions in the County Court of the County of Young, in the State of Texas, the same being the highest Court of said State in which a decision could be had in this suit, because the amount in controversy was less than $100.00, being $89.00, and under the laws of the State of Texas, governing the jurisdictions of the various Courts, no appeal can be had from said County Court, unless the matters and things in controversy exceeds the sum of $100.00, a manifest error has occur-ed, greatly to the damage of the said W. T. Campbell, Plaintiff in Error, in this: That as appears in the record and proceedings, there was drawn in question the issue that the Plaintiff in Error, W. T. Campbell, was being deprived of his property, without due process of law, contrary to Section I of the 14th Amendment to the Constitution of the United States, in this:

That the Defendant in Error, the City of Olney, was seeking, by this suit, to collect from the Plaintiff in Error the sum of $89.00, for putting sidewalks along and adjacent to his property, without his consent, and contrary to his wish and desire, and without any ordinance authorizing such improvements, and without having theretofore adopted the provisions of the Statute, known as Chapter 11, Articles 1006 to 1017 inclusive, and without a hearing, and without taking into account the question of benefits resulting to defendant's property, by reason of said improvements, all of which fully appears in the record and proceedings of the case, and is specifically set forth in the assignment of errors filed herewith, and made a part hereof.

32 Wherefore, Plaintiff in Error prays that a Writ of Error be allowed, and that a transcript of the record, proceedings and papers in which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of such Court in such cases made

and provided, and that the same may be, by the Honorable Court inspected and corrected, in accordance with law and justice.

Respectfully Submitted.

A. H. CORRIGAN,
Attorney for Applicant.

BROWN & GRAHAM,
Of Graham, Texas, and
FITZGERALD & HATCHITT,
Of Wichita Falls, Texas,
Of Counsel.

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the County Court of Young County, Texas; The Honorable W. H. Kennedy, Judge thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said County Court of Young County, *County,* Texas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The City of Olney as Plaintiff and W. T. Campbell as defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United
34 States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said W. T. Campbell as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the United States, the 18th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

[The Seal of the U. S. District Court, Wichita Falls.]

LOUIS C. MAYNARD,
Clerk of the United States District Court
for the Northern District of Texas,
By J. A. LANTZ,
Deputy.

Allowed by

W. H. REEVES,
Judge, County Court, Young Co., Texas.

35 UNITED STATES OF AMERICA, *ss:*

To the City of Olney, or Hon. H. C. McClure, who resides at Jacksboro, Texas, and Hon. Fred Arnold, who resides at Graham, Texas, Its Attorneys of Record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the United States, wherein W. T. Campbell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. H. Reeves, Judge of Co. Ct. of Young Co., Texas, this 30 day of Jany., in the year of our Lord one thousand nine hundred and twenty-two.

W. H. REEVES,
Judge County Court & County Judge,
Young County, Texas.

36 On this 10th day of February, in the year of our Lord one thousand nine hundred and twenty-two, personally appeared C. M. Dodgen, Deputy United States Marshal, Northern District Texas, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to M. P. McCracken, Mayor of the City of Olney and Fred T. Arnold, Attorney of record for the City of Olney (a municipal corporation).

C. M. DODGEN.

Sworn to and subscribed the 10th day of February, A. D. 1922.

[Seal of Notary Public, County of Young, Texas.]

MRS. BEULAH BROWN,
Notary Public, Young County, Texas.

Dock. #499.

37 [Endorsed:] File No. 28,691. Supreme Court U. S., October Term, 1921. Term No. 736. W. T. Campbell, Plff. in Error, vs. The City of Olney et al. Citation and proof of service. Filed Feb. 20, 1922.

38 [Endorsed:] W. T. Campbell, Appellant, Plaintiff in Error, vs. City of Olney, Appellee, Defendant in Error. From the County Court of Young County. Applied for by Brown & Graham, Fitzgerald & Hatchett, Attorneys for Appellant, on the 19th day of December, 1921, and delivered to Brown & Graham, on the 23rd day of December, 1921. W. H. Kennedy, Clerk County Court, Young County, Texas.

Endorsed on cover: File No. 28,691. Texas County Court, Young County. Term No. 266. W. T. Campbell, plaintiff in error, vs. The City of Olney. Filed February 4th, 1922. File No. 28,691.

NO. 326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

W. T. CAMPBELL, Plaintiff in Error

vs

CITY OF OLNEY, Defendant in Error

BRIEF FOR PLAINTIFF IN ERROR

BROWN & GRAHAM,
of Graham, Texas, and
FITZGERALD & HATCHETT,
of Wichita Falls, Texas,
Of Counsel.

Attorneys for Plaintiff in Error.

INDEX

AUTHORITITES

NO. 266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

W. T. CAMPBELL, Plaintiff in Error

vs

CITY OF OLNEY, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

On August 6th, 1921, the City of Olney, a municipal corporation, filed suit in the Justice Court of Precinct No. 3, Young County, Texas, to recover of and from W. T. Campbell the sum of $89.32, averred to be due upon a certificate of assessment issued by said city, and representing the amount due for sidewalks constructed by said city along main street in said city, and

adjacent to Lots 11 and 12, in Block 12, and Lots 1 and 2 in Block 17, which were owned by the said W. T. Campbell.

Said city further averred that the side walk was laid and constructed under and by virtue of the provisions of Chapter 11, of Title 22, of the Rev. Statutes of the State of Texas.

Plaintiff in error answered said suit by pleading that the assessment was void, for the following reasons:

(a) At the time the assessment was made, said city of Olney had no ordinance authorizing said assessment.

(b) It had not passed and published an ordinance authorizing notice and hearing of said assessment.

(c) The assessment was made without a hearing.

(d) Said assessment was made without considering the benefits or advantages to defendant's property.

(e) The City of Olney, not having complied with said statute known as Ch. 11, Title 22, and being Art. 106-117 of the Rev. Civil Statutes of Texas, was without authority to invoke the provisions of said Statute, and its action in making the assessment was contrary to Sec. 1, of the 14th Amendment to the Constitution of the United States, in that, it was a taking of the property of a citizen without due process of law.

The plaintiff answered this plea by averring that the defendant was estopped from making this character of defense by Art. 1015, of the stautes referred to, which article in substance provides that a property owner may bring suit to set aside any assessment made against his property within twenty days from the date

of the assessment. But thereafter he shall not complain or bring suit to complain of any matters growing out of said assessment.

The cause was tried in the Justice Court, and judgment rendered for the defendant. The City of Olney appealed the cause to the County Court of Young County, and by a trial in the last named court, judgment was rendered in favor of the City of Olney for the amount sued for, the Hon. Court holding that the defendant could not interpose the defenses urged, and could not introduce any testimony to show that the City of Olney had not legally adopted and put in force Ch. 11, Title 22, of the Rev. Civil Statutes of Texas, on the ground that Art. 1015 inhibited the defendant from making any defense whatever to the plaintiff's cause of action. Art. 1015 reads as follows:

"Any property owner, against whom or whose property any assessment or reassessment has been made, shall have the right within twenty days thereafter to bring suit in any court having jurisdiction, to set aside or correct the same, or any proceeding with reference thereto, on account of any error or invalidity therein. But thereafter such owner, his heirs, assigns or successors, shall be barred from any such action, or any defense of invalidity in such proceedings or assessments or reassessments in any action in which the same may be brought in question."

Plaintiff in error made the contention that before the cost of any assessment against a property owner in said city could be made a legal and binding obligation of the citizen, the governing body of said municipal

corporation would have to make, pass and promulgate an ordinance to that effect. Art. 1011 of Ch. 11, Title 22, reads as follows:

"Subject to the terms hereof, the governing body of any city shall have power, by ordinance, to assess the whole cost of constructing sidewalks or curbs, and not to exceed three-fourths of the cost of any other improvement, against the owners of property abutting on such improvement and against their abutting property benefitted thereby, and to provide for the time and terms of payment of such assessments and the rate of interest payable upon deferred payments thereon, which rate of interest shall not exceed eight per centum per annum, and to fix a lien upon the property and declare such assessments to be a personal liability of the owners of such abutting property; and such governing body shall have power to cause to be issued in the name of the city assignable certificates, declaring the liability of such owners and their property for the payment of such assessments, and to fix the terms and conditions of such certificate.

If any such certificate shall recite that the proceedings with reference to making such improvements have been regularly had in compliance with law, and that all the prerequisites to the fixing of the assessment lien against the property described in said certificate, and the personal liability, shall be prima facie evidence of the facts so recited, and no further proof thereof shall be required in any court.

The ordinance making such assessment shall provide for the collection thereof, with costs and reason-

able attorney's fees, if incurred. Such assessments shall be secured by, and constitute a lien on said property, which shall be the first enforcible claim against the property against which it is assessed, superior to all other liens and claims, except state, county and municipal taxes."

Plaintiff in error made, upon the trial of said cause, the contention that in as much as the assessment against the property of the plaintiff in error was made without any ordinance whatever, and the certificate upon which suit was founded was issued without an ordinance authorizing the same, and all the proceedings were had without an ordinance from the governing body of said city, as is provided by the Article above quoted, then and for that reason, said city acted without authority, and the assessment and certificates were void. Therefore, Art. 1015, of Ch. 11, Title 22, did not in any manner estop the defendant from pleading and proving the matters and things plead as a defense to the cause of action urged.

Plaintiff in error asked for a jury, and a jury was impanelled and sworn to try the issues, but the court, acting on the authority of the Statute, Art. 1015, above quoted, would not allow plaintiff in error to introduce any proof.

Plaintiff in error filed his motion for a new trial, and moved the court to set aside its judgment, as appears from the transcript of record, pp. 5, 6, 7 and 8, properly raising the question and contention hereinabove set out. The court overruled this motion, as more fully appears from the transcript of record, p. 9.

Plaintiff in error assigned errors, raising this question by assignment No. 1, No. 2 and No. 3, ie; in assignment No. 1, plaintiff in error complains of the action of the court in not permitting him to prove that, at the time the assessment was made upon which suit was founded, no ordinance or resolution of any kind or character had been made directing the putting in of sidewalks, or the character of improvements represented by its certificate; and by second assignment that no ordinance or resolution was made or promulgated providing for a hearing and notice to property owners of the character of assignment; and by assignment No. 5 that no ordinance or resolution providing for the fixing of time and notice of a hearing was had. By the 6th assignment, error is assigned to the court's action in refusing to allow plaintiff in error to introduce any testimony on the trial of said case, substantiating the pleas set out in his pleading, as more fully appears from the assignment of errors, Nos. 1 to 7 inclusive. (Pp. 10 and 11 Tr. of record). These assignments are based upon bill of exception No. 1, Tr. p. 12, bill of exception No. 2, Tr. pp. 14 and 15 and bill of exception No. 3, Tr. pp. 16 and 17.

This case is before this Hon. Court on practically the sole question (a) whether or not Art. 1015 of the Rev. Statutes of the State of Texas inhibited the plaintiff in error from urging as a defense to this suit the fact that the city of Olney had no ordinance authorizing the assessment by the city as made against the property of plaintiff in error, and (b) whether or not the denial to the plaintiff in error of the defenses here urged

was a violation of Sec. 1 of the 14th Amendment to the Constitution of the U. S.

ASSIGNMENTS OF ERROR.

"(1) The Court erred in not allowing the defendant to prove on the trial of said cause that the plaintiff had not complied with the law, as set out in its assignment certificate, introduced in evidence, in that, it had no ordinance or resolution of any kind or character, ordering or directing the putting in of sidewalks, or that character of improvements represented by its certificate, at the time the assessment against this defendant was made, for the reason that the City of Olney was without authority to invoke the provision of Chapter 11, Title 22, and being Article 106 to 107 inclusive, without the adoption of said ordinance or resolution.

(2) The Court erred in refusing to allow the defendant to prove on the trial of said cause that the plaintiff had never passed any ordinance or resolution, providing for a hearing, and notice of the character of assessment, called for in its certificate, without this notice, the action of the City Council was a nullity, and amounted to the taking of plaintiff's property, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(3) The Court erred in not permitting the defendant, on the trial of said cause, to prove that he was denied a hearing at the time the assessment was made against him, for the reason that without such hearing, the action of the City was null and void, and it amounted to the taking of defendant's property, without due process of law, and was contrary to Section 1 of the 14th Amendment to the Constitution of the United States.

(4) The trial court erred in not allowing the defendant, W. T. Campbell, to prove that the City Council, in making said assessment against him, did not take into consideration the benefits to the defendant's property, and that said assessment was made without taking into account the benefit said improvements would be to defendant's property, for the reason that said evidence would have shown that the City Council did not take into account said benefits, and their action in making said assessment was null and void, and contrary to the law, and inhibited by Section 1 of the 14th Amendment to the Constitution of the United States.

(5) The Court erred in not allowing the defendant to prove on the trial of said cause that the City Council of Olney had never passed any ordinance or resolution, providing for the fixing of a time, and the notice of a hearing, on the question of assessment, as provided by Statute; because, without such an ordinance or resolution the action of the city, in making the assessment, was void, and of no force and effect, and constituted a taking of defendant's property, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(6) The Court erred in holding that the defendant could not introduce any testimony on the trial of said cause, because Article 1015 of Chapter 11, Title 22 provided that the defendant must bring a suit to set aside the assessment within twenty (20) days after such assessment was made by the City, or thereafter be estopped from interposing any character of defense to plaintiff's suit to recover on said assessment; for the reason that, if the defendant could show, and which he could have shown, that the City Council had never adopted or passed any ordinance or resolution, placing the Municipal Government of Olney under the provis-

ions of said Chapter and Title, that it would be without authority to invoke the provisions of said Chapter against this defendant, and for said reasons would constitute a taking of the defendant's property, and denying the defendant his day in court, all of which is contrary to Section 1 of the 14th Amendment of the Constitution of the United States.

(7) The Court erred in not allowing the defendant to introduce testimony on the trial of said cause showing that the plaintiff had not complied with the Articles of said Statute, in this:

(a) That it had passed no ordinance or resolution, adopting the provisions of said Statute, and the time said assessment was made.

(b) That it had passed no ordinance or resolution, providing for the assessment that was made against the defendant.

(c) That it had passed no ordinance or resolution, providing for notice and a hearing on said assessment, at the time the assessment was made; because the certificate introduced in evidence, at best, only made a prima-facie case, which the defendant had a right to overcome, with the character of proof set out above." (Tr. of record, pp. 10 and 11.)

ARGUMENT

We submit that the Hon. County Court of Young County erred in holding that plaintiff in error could not prove on the trial of said cause that the city of Olney had no ordinance or resolution at the time it made its assessment against the plaintiff in error for the character of improvements called for.

Art. 1006, Ch. 11, Title 22 of the Revised Civil Statutes of Texas provides that towns, cities and vil-

lages, incorporated either under general or special law, which shall accept the benefits of this Chapter, as therein provided, shall have power to improve any street, avenue, alley, highway, etc.

Art. 1007 defines the term "City" to include all incorporated towns, cities and villages; that the term "Governing Body" includes the governing or legislative bodies of all incorporated towns, cities or villages, and that the term "Highway" includes street, avenue, alley, highway, public place or square.

Art. 1008 stipulates the power of the governing body to order improvements, select materials and the method of improvements, and to contract for the same in the name of the city, and to provide for the payment of the cost of such improvement out of the funds of the city.

Art. 1009 provides that the cost of the improvements may be paid entirely by the city, or partly by the owners of property abutting thereon, etc.

Art. 1010 provides that the city shall have power to assess against any railroad or street railroad occupying any highway in said city the cost of the improvements between or under the rails and tracks of said railway and extending two feet on either side thereof, etc.

Then follows Art. 1011, which reads as follows:

"Subject to the terms hereof, the governing body of any city shall have power, by ordinance, to assess the whole cost of constructing sidewalks or curbs, and not to exceed three-fourths of the cost of any other improvement against the owners of property abutting

on such improvement and against their abutting property benefitted thereby, and to provide for the time and terms of payment of such assessments and the rate of interest payable upon deferred payments thereon, which rate of interest shall not exceed eight per centum per annum, and to fix a lien upon the property and declare such assessments to be a personal liability of the owners of such abutting property; and such governing body shall have power to cause to be issued in the name of the city assignable certificates, declaring the liability of such owners and their property for the payment of such assessments, and to fix the terms and conditions of such certificate.

If any such certificate shall recite that the proceedings with reference to making such improvements have been regularly had in compliance with law, and that all prerequisites to the fixing of the assessment lien against the property described in said certificate, and the personal liability, shall be prima facie evidence of the facts so recited, and no further proof thereof shall be required in any court.

The ordinance making such assessments shall provide for the collection thereof, with costs and reasonable attorney's fees, if incurred. Such assessments shall be secured by, and constitute a lien on said property, which shall be the first enforcible claim against the property against which it is assessed, superior to all other liens and claims, except state, county and municipal taxes."

Art. 1012 has reference to exempt property, and the personal liability of the owner of said property.

Art. 1013 has reference to the notice and hearing before any assessment can be made, and also provides that no assessment shall ever be had in excess of the benefit to said property as a result of said improvements, and the latter part of said Article reads as follows: "The governing body of any city making improvements under the terms hereof, shall, by ordinance, adopt rules and regulations providing for such hearings to property owners, and for giving reasonable notice thereof."

Art. 1014 provides for correcting mistakes and errors and irregularities with reference to such improvements, or the assessment and cost to property owners, and for reassessment.

Then follows Art. 1015, which reads as follows:

"Any property owner, against whom or whose property any assessment or reassessment has been made, shall have the right, within twenty days thereafter, to bring suit in any court having juridiction, to set aside or correct the same, or any proceeding with reference thereto, on account of any error or invalidity therein. But thereafter such owner, his heirs, assigns or successors, shall be barred from any such action, or any defense of invalidity in such proceedings or assessments or reassessments in any action in which the same may be brought in question."

Art. 1016 provides that any city of the character named may adopt the provisions of the chapter and the ordinances to carry out the same.

Then follows the last Article, which is 1017, which provides that this Chapter shall not repeal any law,

general or special, already in existence, pertaining to the making of such improvements, but that the provisions of this Chapter, and of resolutions or ordinances passed pursuant thereto shall be cumulative of, and in addition to, such existing law, and providing further that in case of a conflict between the provisions of this Chapter and the provisions of any law granting a special charter, the provisions of the latter shall control.

We most respectfully urge that the provisions of the Articles above enumerated of our Revised Civil Statutes clearly provide that the governing body of any city, town or village, desiring to adopt its provisions, and after the referendum vote adopting its provisions as called for under said Statute, that the city must invoke the terms, conditions and provisions of said Statute by ordinances and resolutions.

We think that said Staute, taking its Articles as a whole, from 1006 to 1017 inclusive clearly provide that the city of Olney, after having adopted the provisions of Ch. 11, Title 22, by referendum vote, could not legally make an assessment against plaintiff in error for improvements such as called for, without first having passed an ordinance, calling for the character of improvements, and that said city could not have had a hearing as to said assessment without first passing an ordinance adopting such rules and regulations for such hearings to property owners, and for the giving of reasonable notice thereof, as called for in Art. 1013 of said Statute above quoted.

But we are not left to the wording of the Statute alone, because the Supreme Court of Texas has passed

upon this question in the case of the city of Waco vs. Prather, cited in the 37th S. W. p. 312. Justice Brown, speaking for the Court said:

"This was a suit by the city of Waco to recover from the defendant in error taxes assessed against his property on Austin street, in the said city, to pay for the improvement of the street in front of his property. The district court held that the proceedings of the city council in reaching the determination to do the work, and by which the pavement contract was entered into, were void, because not done by ordinance or resolution of the city council. The only evidence of the action of the city council ordering the work to be done, and entering into the contract with the contractor, was entries of the city secretary upon the minutes of the council. Judgment was rendered by the district court for the defendant in error, which was affirmed by the court of civil appeals.

This application will be refused, because we believe that the judgment of the district court is correct, and that there is no reversible error in the proceedings in either court. In affirming the judgment of the district court, the judge who delivered the opinion of the court of civil appeals placed the affirmance upon the ground that "inasmuch as the city council had power to pass ordinances, it could proceed to contract for and to construct the improvement of the streets by ordinance only." This seems to hold that the work could not have been done by virtue of a resolution adopted by the city council. In our opinion, the council might have acted either by ordinance or resolution, but the improvement could not be ordered nor the con-

tracts entered into without either ordinance or resolution adopted by the city council."

We submit that the Statute and the provisions thereof unquestionably make the acts of any city, town or village assessing the property owner with the cost of improvements absolutely a nullity, unless there be an ordinance passed by said city, prior to the time of making the assessment, calling for the character of improvements for which the property owner is assessed, and the certificate issued upon such assessment is void, and the notice of hearing, etc., under the Statute would be void, unless the City Council had made and published its ordinance calling for the notice, hearing, rules, regulations, etc.

It is unquestioned in this record that no ordinance was passed prior to the assessment authorizing the assessment; that no ordinance whatever or resolution was passed regarding notice and hearing of the assessment. The City of Olney acted without any resolution or ordinance, and for said reason, we submit that its acts were void. It is well to remark, however, that it is not seriously contended that the position taken by plaintiff in error, as hereinabove set out, is without merit. But we are met with the proposition that this defense came too late, and is barred under the Statute, Art. 1015, above quoted.

Our contention and our answer to this plea of estoppel is that, the ordinance or resolutions called for by the Statute were necessary to give jurisdiction to make this assessment, and to issue this certificate, and the city of Olney, not having thereby acquired jurisdic-

tion to make the assessment, and to issue the certificate that the limitation of the Statute does not apply. We think that this Statute applies to such defects and irregularities in the proceedings under the Statute as would render the assessment or reassessment voidable and not void.

We call this Hon. Court's attention to the case of Elmendorf et al vs. the City of San Antonio et al, reported in the 242 S. W. p. 185, and the opinion therein by the Supreme Court of the State of Texas, wherein Art. 1015 of our revised Statutes was construed. The Court, on this point said:

"We think this statute should be held to apply only to such defects and irregularities in the proceedings as would render the assessment or reassessment voidable, and not void. It cannot be interposed to aid an assessment which is void on jurisdictional grounds, as shown on the face of the proceedings. The assessment, in this case, and all "the proceedings with reference thereto," in so far as they concern the right of the city to impose any cost of improvements on plaintiffs in error, are mere nullities having no more life, force, or power than if they had never been attempted. Being such, plaintiffs in error could entirely ignore them as ineffectual to create any charge upon their property. Not until suit was brought upon the certificate, which would culminate, by default on their part, in a judgment against them and their property, did they have any cause for complaint. This provision as to limitation of the time after which the owner "shall be barred from an action or defense" confers no rights upon the city.

"Like all limitation laws, it does not affect the cause of action. It simply destroys the remedy, denying relief to him who has unreasonably slept upon his rights, and leaving the parties where it found them. In no case is it effective to create a cause of action where none existed, nor is it operative except as against one who has an existing right of action during the period of limitation. How, then, in this case, can it be said that plaintiffs in error are barred by a failure to institute proceedings at a time when they had no legal ground for complaint, and therefor no right of action. As the proceedings which led up to the assessment were had without jurisdiction, and consequently without any legal effect upon the property rights of plaintiffs (in error), the mere failure to act certainly could not alter the situation of either party. As said in McCoy vs. Anderson, 47 Mich. 505 (11 N. W. 290): 'Any other view would be open to the objection of attempting to deprive parties of their property without due process of law, and this evidently was not contemplated by the statute relied upon.' One may ordinarily wholly disregard void proceedings, so long as no attempt is made to enforce them. City of New Haven vs. Fair Haven & W. Ry Co., 38 Conn. 422; Williams vs. Saginaw, 51 Mich. 120 (16 N. W. 260). It necessarily follows, as void proceedings affect nothing, that legal rights cannot grow out of them by mere lapse of time, without the introduction of other circumstances or conditions affecting the parties." Steinmuller vs. Kansas City, supra; Crane vs. Siloam Springs, supra.

"A statutory provision that suit to set aside or enjoin the making of an assessment shall be brought

within a specified time is constitutional, and an action brought after the expiration of such designated period will not be entertained; but such a statutory limitation will not apply where the assessment is based upon absolutely void proceedings." 28 Cyc. p. 1188.

We also call the Court's attention to the case of Crane vs. Siloam Springs, 67 Ark. p. 30, wherein a similar statute was under construction by the Supreme Court of Arkansas. The Court on this point said:

"It is contended by counsel for appelllees that this provision of the statute cuts off all omissions, irregularities, and errors on the part of the council in creating the improvement district, and making the assessment upon the property therein, unless the action contesting the same be commenced within 20 days after publication of the order of assessment. The question is not free from doubt, but, after considering the same, we are of the opinion that the section quoted has reference to errors or irregularities in the proceeding upon the second petition relating to the assessment, and that the 20 days limitation bars only such ommissions and irregularities as occur subsequent to the passage of the ordinance establishing the district and the publication thereof. If no improvement district has been established, then the petition for the assessment and the ordinance therefor have no foundation to rest upon, and are without authority and void; for the council has no power to make the assessment until after a district has been established and publication made in accordance with the statute. The property owners may set up and show this want of authority before or after the expira-

tion of the 20 days from the publication of the assessment ordinance."

We submit that plaintiff in error has been deprived to his day in court; that he has been prevented from interposing a legal defense to the illegal and unjust demand of defendant in error; that he has been deprived of his property and property rights, without due process of law, contrary to, and in violation of, Sec. 1 of the 14th Amendment to the Constitution of the United States.

Wherefore, plaintiff in error prays that said judgment be, in all things, reversed and rendered, or, in the alternative, reversed and remanded.

Respectfully submitted,

A. D. Carrigan

Attorneys for Plaintiff in Error

BROWN & GRAHAM,
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FITZGERALD & HATCHETT,
of Wichita Falls, Texas,
Of Council.

No. 266.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

W. T. CAMPBELL,
Plaintiff in Error,

vs.

CITY OF OLNEY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM B. JAYNES,
Attorney for Defendant in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITY OF OLNEY,
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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

An election was held in Olney, Texas, February 21, 1919, which adopted the provisions of Chapter 11, Articles 1006 to 1017, inclusive, of the Revised Statutes of the State of Texas, applicable to towns and cities. On February 24, 1919, after canvassing the votes cast in such election the city council in conformity with law declared the adoption of such applicable Articles. On May 11, 1919, the city council ordered the construction of certain sidewalks (Excep. No. 2, par. 3, p. 14, Rec.); on May 16, 1919, the council declared by ordi-

nance No. 59 (Excep. No. 2, par. 3, p. 15, Rec.), that all sidewalks constructed by the city would be assessed against abutting property as a lien. That ordinance also specifically provided for notice to such interested property owners. This plaintiff in error was given notice as provided by statute and ordinance law (Excep. Nos. 2 and 3, p. 16, Rec.); but plaintiff in error failed to attend such meeting, or to file any protest against such assessment, or to institute court proceedings to correct or set aside such. On July 18, 1921 (Rec., pp. 12 and 13), the City of Olney issued its certificate of liability against the involved property of plaintiff in error and also against him personally for the assessed sum. Plaintiff in error did not make payment thereof, whereon defendant in error sued for personal liability in the justice court, Precinct No. 3, Young County, Texas, for the sum of $89.32, where judgment was rendered in favor of plaintff in error. From that judgment defendant in error appealed to the county court of Young County, Texas, where personal liability judgment against plaintiff in error was secured. From that judgment the plaintiff in error has appealed to this honorable court, and claims that his constitutional property rights have been infringed by that judgment..

ARGUMENT.

It is believed that the action of the county court of Young County, Texas, in sustaining judgment against plaintiff in error was in all respects within proper interpretation of the statute laws and city ordinances involved. Counsel for plaintff in error enumerates with considerable detail the provision of the respective

Articles from 1006 to 1017, inclusive, of the Revised Statutes of Texas relating to towns, cities and villages. Several of those Articles are not pertinent to the questions involved in this controversy. However, it is deemed proper to here quote at length Article 1011, which reads as follows:

> "Subject to the terms hereof, the governing body of any city shall have power, by ordinance, to assess the whole cost of constructing sidewalks or curbs, and not to exceed three-fourths of the cost of any other improvement against the owners of property abutting on such improvement and against their abutting property benefited thereby, and to provide for the time and terms of payment of such assessments and the rate of interest payable upon deferred payments thereon, which rate of interest shall not exceed eight per centum per annum, and to fix a lien upon the property and declare such assessments to be a personal liability of the owners of such abutting property; and such governing body shall have power to cause to be issued in the name of the city assignable certificates, declaring the liability of such owners and their property for the payment of such assessments, and to fix the terms and conditions of such certificate.
>
> If any such certificate shall recite that the proceedings with reference to making such improvements have been regularly had in compliance with law, and that all prerequisites to the fixing of the assessment lien against the property described in said certificate, and the personal liability, shall be prima facie evidence of the facts so recited, and no further proof thereof shall be required in any court.
>
> The ordinance making such assessments shall provide for the collection thereof, with costs and reasonable attorney's fees, if incurred. Such

> assessments shall be secured by, and constitute a lien on said property, which shall be the first enforceable claim against the property against which it is assessed, superior to all other liens and claims, except state, county and municipal taxes."

Counsel for plaintiff in error argues that the words "by ordinance" as expressed in the second line of the foregoing Article mean there must be a specific ordinance, detailing with great particularity the abutting property which will be benefited by the improvements and against which a lien will be reserved.

The Articles from 1006 to 1017, when read in conjunction, do not warrant the conclusion of counsel for plaintiff in error. The declaration there "by ordinance" clearly means that an ordinance must declare whether the cost for such improvements is a lien against any benefited property or whether it is a personal charge against the owner, or whether it is both a lien and personal charge, and that declaration was unquestionably made as evidenced by ordinance No. 59, May 16, 1919 (Record, p. 15). It is not believed that any appellate court of Texas has ever placed such a construction on "by ordinance" as that sought to be impressed by counsel for plaintiff in error. The two cited decisions of the Supreme Court of Texas do not in any manner sustain counsel's contention, because a careful reading thereof in connection with the preceding decisions of the Court of Appeals deciding those cases will clearly show that the basic facts and questions of law in each are wholly apart from those in this case.

Counsel for plaintiff in error quotes two paragraphs from the decision by the Supreme Court of Texas in the case of the City of Waco vs. Prather, 37th S.W.,

p. 312, wherein the decision of the Court of Appeals was sustained. The City of Waco was acting under a special charter, which provided in a specific way for all details relating to street improvements. The city council proceeded with its improvement work in this instance, but had not passed any general or specific ordinance creating a lien against abutting property or declaring a personal liability for such street improvements. Payment was sought from defendant, but he declined to pay the involved sum, and it was more than one year after the completion of the work before the City of Waco even passed an ordinance declaring lien or liability, and then it was shown in the trial court that such ordinance was not passed in keeping with the provisions of the city's special charter. The controversial questions therein and decision thereof are fully discussed and stated in 35 S. W., Waco vs. Prather, page 958. The involved facts in that case are so foreign to those in this that counsel for defendant in error does not believe any serious consideration will be given to the doctrine there announced.

Counsel for appellant in error quotes at length from the recent case of Elmendorf *et al.* vs. the City of San Antonio *et al.*, reported in the 242 S. W., p. 185, and therein seeks to impress this honorable Court that the doctrine enunciated in that decision should be accepted as a controlling force in this controversy. A careful reading of the facts and law involved in that case will readily show that it is wholly unrelated to this case. The City of San Antonio through the direction of a special charter had adopted a procedure ordinance. It seems that ordinance required the specific and detailed enumeration through a specifically enacted and published ordinance before lien against

property or personal liability attaches. The property owned by Elmendorf was within a zone where city improvements of a large magnitude were directed. In keeping with its charter provisions San Antonio adopted and published an ordinance for the purpose of specifically enumerating the respective pieces of property within the improvement zone. Within that zone was the Elmendorf property; but from the provisions of that ordinance was omitted both the name of Elmendorf and the description of his property. Elmendorf refused to pay the city assessment, and the city of San Antonio brought a suit to enforce its claims. Elmendorf asserted non-liability because his property had not been enumerated and he had not received notice to appear in opposition to any assessment, and that therefore the entire proceeding in so far as he was concerned was wholly void and of no force. In that contention he was sustained by the Supreme Court of Texas. But in this, as in the case of Waco vs. Prather, previously discussed, counsel for plaintiff in error presents a statement of facts and law far removed from the facts and law involved in this controversy.

The reading of the record in this case is convincing that the city authorities of Olney sought in every legal method to execute the respective provisions of the Texas statutes governing towns and cities. This plaintiff in error had full knowledge of all actions taken by the city council relative to such public improvements as abutted his property. He had legal notice to appear before the council and protest, but he failed to take that affirmative action. He ignored the civil authorities of his town, and now seeks to overturn their ordinances providing for city improvements. Ordi-

nance No. 59 (Rec., p. 15), ordained that property owners be given twenty days' notice before any assessment would become a lien against property or any personal liability incurred. Plaintiff in error admitted in open court that he had been served with proper notice by the city council to appear and make any complaint respecting the assessment (Rec., p. 16); but he did not embrace that opportunity.

Plaintiff in error was duly advised of an assessment againt his property; but he failed to bring any suit to set aside or correct the same within twenty days from the date of assessment, as he had the right to do under Article 1015, which reads as follows:

> "Any property owner, against whom or whose property any assessment or reassessment has been made, shall have the right, within twenty days thereafter, to bring suit in any court having jurisdiction, to set aside or correct the same, or any proceeding with reference thereto, on account of any error or invalidity therein. But thereafter such owner, his heirs, assigns or successors, shall be barred from any such action or any defense of invalidity in such proceeding as assessments or reassessments in any action in which the same may be brought in question."

Not only did plaintiff in error make default in appearance before and protest to council, but he also failed to prosecute the remedy as above provided by law for judicial relief against such assessment. Surely under such circumstances the assessment as made by the council was final and binding upon plaintiff in error, and such provisions of law and the actions taken thereunder were not in violation of the Fourteenth Amendment to the Constitution of the United States

prohibiting a state from depriving any person of property "without due process of law."

The constitutionality of the provisions in Article 1015 have been broadly sustained by the Texas Court of Appeals in Dillon vs. Whitley, 210 S. W. R., 329, when it says:

> "In his brief appellant admits that he was served with notice of the time and place set for the hearing of objections to the assessment and that he filed no objections thereto. It thus appears that by the charter of the city that the board of commissioners was vested with judicial functions to hear and determine the amount of assessments to be made against appellants property and that the board did determine that question adversely to the claim now asserted by appellant, and that he was duly served to appear at such hearing, but made default, and also failed to prosecute the remedy provided by charter for judicial relief against such assessment. Under such circumstances we are of the opinion that the assessment made by the board of commissioners was final and binding upon appellant as found by the trial judge, and that such charter provisions were not in violation of the fifth and fourteenth amendments to the Federal Constitution, prohibiting a State from depriving any person of property without due process of law."

Paragraph 442, Volume 6, R. C. L., clearly summarizes in a few lines the enunciated meaning of the words "due process of law" when it states "the essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." Surely no one will contend that plaintiff in error was not offorded such an opportunity.

The rights of the States in providing assessments for improvements by cities and towns are clearly announced in the well-known decision of Hibben vs. Smith, 191 U. S., p. 310. The specific doctrine stated in that decision is highly pertinent and seems clearly decisive of the question here at issue. With reference to this decision it is thought wholly sufficient to quote the second paragraph of the syllabus, which reads as follows:

> "In the apportionment of assessments for improvements due process of law is afforded the taxpayer if he is given an opportunity to be heard before the body making the assessment; and so far as the Federal Constitution is concerned, the State Legislature may provide such hearing shall be conclusive."

It is submitted that plaintiff in error has not been deprived of his day in court, that he has not been prevented from interposing a legal defense to the legal and just demands of this defendant in error; that he has been in no sense deprived of his property or property rights without due process of law and contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Wherefore defendant in error prays that such judgment be in all things affirmed.

Respectfully submitted,

WILLIAM B. JAYNES,
Attorney for Defendant in Error.

CAMPBELL *v.* CITY OF OLNEY.

ERROR TO THE COUNTY COURT OF YOUNG COUNTY, STATE OF TEXAS.

No. 266. Submitted April 20, 1923.—Decided May 21, 1923.

1. Unless a federal right is involved, a state court's application of the local laws will not be reviewed here. P. 354.
2. Where a property owner, complaining of a special sidewalk assessment, had full opportunity, under the state laws, to be heard before the assessment was made, and a reasonable time thereafter to bring suit to set it aside, or to correct it or any proceeding with reference to it, but failed to avail himself of these rights, and did not draw in question the validity of the state laws, *held*, that a contention that he was denied due process of law was not even colorable. *Id.*

Writ of error dismissed.

ERROR to a judgment of a county court, of Texas, (the highest court to which the cause could be taken in that State,) in favor of the City of Olney, in its action to collect a sidewalk assessment from the plaintiff in error.

Mr. A. H. Carrigan for plaintiff in error.

Mr. William B. Jaynes for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

A statute of Texas (Rev. Civ. Stats. 1911, c. 11, Arts. 1006–1017), empowered the City of Olney to lay sidewalks and to assess the cost against abutting property and owners. The City ordered the construction of sidewalks in front of four lots owned by plaintiff in error. An ordinance was passed making the cost of sidewalks a lien against abutting property, and providing for 20 days' notice to the owner, before charging such cost personally against him or as a lien upon his property. Plaintiff in

error was given notice in compliance with the statute and ordinance. He failed to appear or make objection to the assessment.

The statute provides that any property owner against whom or whose property such assessment has been made may within 20 days bring suit in any court having jurisdiction to set aside or correct the same or any proceeding with reference thereto, on account of any error or invalidity therein; but thereafter, he may not question the validity of such proceedings or assessment. No suit was brought by the plaintiff in error. The City issued its assessment certificate, declaring the cost of the sidewalks, $89.32, a charge against him and against the lots.

The statute further provides that if any such certificate shall recite that the proceedings have been regularly had, and that all prerequisites to the fixing of the assessment lien and personal liability have been complied with, it shall be *prima facie* evidence of the facts so recited. The certificate contained these recitals. Plaintiff in error failed to pay, and the City brought suit in justice court. He answered in substance that the City had no ordinance authorizing the assessment; that it had not complied with the statute, and was therefore without authority to invoke it, and that its acts and conduct in making the assessment constituted a taking of his property without due process of law in violation of the Fourteenth Amendment. He contended that there should have been a specific ordinance concerning this sidewalk and assessment.

The justice of the peace gave judgment in favor of plaintiff in error. The City appealed to the county court. At the trial, it offered the assessment certificate in evidence and rested. Plaintiff in error offered to prove that no ordinance had been passed relative to the laying of this particular sidewalk; that he received the notice to appear, and went to the meeting place of the city council, and that the council had adjourned. He did not offer

to prove any fact excusing his failure to appear before adjournment, or that he was denied a hearing. The county court found for the City. Its order denying a motion for a new trial recites that it is the highest appellate court to which the cause can be taken in the State of Texas because the amount involved is less than $100. The county judge allowed a writ of error bringing the case here.

The judgment of that court necessarily determines that the state laws were complied with. Unless a federal right is involved, the state court's application of local laws will not be reviewed here. *Hallinger* v. *Davis*, 146 U. S. 314, 319; *Peters* v. *Broward*, 222 U. S. 483, 492; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 234; *Wade* v. *Travis County*, 174 U. S. 499, 508; *Osborne* v. *Florida*, 164 U. S. 650, 654; *Bardon* v. *Land & River Improvement Co.*, 157 U. S. 327, 331; *Missouri* v. *Lewis*, 101 U. S. 22, 32–33. Plaintiff in error had opportunity to be heard before the city council and was allowed a reasonable time after the assessment to bring suit to set it aside or to correct it or any proceeding with reference thereto. He failed to avail himself of the rights so given him by state laws. Their validity was not drawn in question. His claim that he was denied due process of law is not even colorable. *Valley Farms Co.* v. *County of Westchester*, 261 U. S. 155; *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63, 69; *Hibben* v. *Smith*, 191 U. S. 310, 321, *et seq.*; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 334, 344, and cases cited. There is no federal question in the case.

The writ of error is dismissed.